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No. 88-226

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

BENJAMIN R. WARD, *et al.*,
Petitioners,
v.
ROCK AGAINST RACISM,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, U.S. CONFERENCE OF MAYORS, AND COUNCIL OF STATE GOVERNMENTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Pursuant to Rule 36.3 of the Rules of this Court, *amici* respectfully move for leave to file the attached brief *amicus curiae* in support of petitioners. Petitioners have consented to the filing of this brief; their letter of consent has been filed with the Clerk. This motion is made necessary because respondent's counsel has not responded to our requests by letter and telephone for consent.

Amici, organizations whose members include state, county, and municipal governments and officials through-

out the United States, have a compelling interest in legal issues that affect state and local governments.

This case concerns New York City's regulations for controlling the sound level at public concerts in one of its park facilities—regulations designed to protect the peace and tranquility of its citizens while at the same time preserving the freedom of expression of artistic performance. The City * adopted Use Guidelines providing for the use of a sound amplification system furnished and operated by a private sound technician under contract with the City. The technician was subject to the direction of a representative of the concert's sponsor regarding the sound mix, and exercised independent control only with respect to the overall noise level.

Respondent Rock Against Racism ("RAR"), a group that sponsors an annual "musical/political" event at the Naumberg Acoustic Bandshell ("Bandshell"), filed a facial challenge to the Use Guidelines under the First Amendment, and obtained a temporary injunction against their application to respondent's May 1986 concert. After a trial, the district court, finding that the City's objectives were to control the noise level of concerts and to ensure the quality of sound at Bandshell events, upheld the challenged requirement. The court of appeals agreed with the district court that the City had the right to control the sound volume of Bandshell concerts. The court of appeals, however, reversed in part, concluding that the requirement that a sponsor use the sound system and technician chosen by the City was not the "least intrusive" means to serve that interest.

In *amici*'s view, the application by the court of appeals of "the least intrusive means" standard as the measure of a narrowly tailored regulation affecting expression demonstrates the need for a clear statement by this Court of the meaning of "narrowly tailored." We believe that the City's Use Guidelines would pass scrutiny under a "least intrusive means" test, but our principal concern is that such a test runs against the prevailing weight and logic of this Court's First Amendment cases evaluating content-neutral time, place, and manner regulations. This unduly rigid standard would impose an unwarranted burden on the government without achieving any significantly heightened protection of core First Amendment freedoms.

Amici are also concerned with the expansion by the court below of the rights guaranteed by the First Amendment. The right to self-expression has never before been held to encompass the right to use a particular sound amplification system. In the absence of a showing that the system provided by the City fails to meet respondent's expressive needs, it appears that there is no infringement of its rights that would call for application of the least intrusive means test or any other First Amendment test.

Amici submit that the decision below is wrong. Because this Court's decision will have a direct effect on matters of prime importance to *amici* and their members, *amici* seek leave to file this brief to assist the Court in its resolution of the case.

Respectfully submitted,

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November 29, 1988

* We refer to all petitioners collectively as the "City."

QUESTIONS PRESENTED

1. Whether a municipal regulation designed to control the noise level at concerts in a public park that requires concert sponsors to use sound equipment and technicians provided by the City, but allows sponsors to choose the sound mix, is a valid time, place, and manner regulation.

2. Whether a time, place, and manner regulation of expressive conduct must be the "least restrictive" means in order to be adjudged narrowly tailored.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF THE *AMICI CURIAE*	1
STATEMENT	1
1. *The need to control excessive sound in Central Park*	1
2. *The Use Guidelines*	3
3. *Proceedings below*	6
SUMMARY OF ARGUMENT	8
ARGUMENT	9
I. THE USE GUIDELINES ARE A VALID CONTENT-NEUTRAL REGULATION OF THE TIME, PLACE, AND MANNER OF EXPRESSION	9
A. The Use Guidelines Are Content-Neutral	11
B. The Use Guidelines Leave Open Ample Alternative Channels Of Communication	12
C. The Use Guidelines Are Narrowly Tailored To Serve Significant Governmental Interests	13
II. THE LEAST RESTRICTIVE MEANS STANDARD IS NOT THE PROPER MEASURE OF THE VALIDITY OF TIME, PLACE, AND MANNER REGULATIONS	16
A. *O'Brien* Does Not Require Application Of A Least Restrictive Means Standard To Time, Place, And Manner Regulations	17

TABLE OF CONTENTS—Continued

	Page
B. This Court Has Specifically Rejected A Least Restrictive Means Standard For Review Of Time, Place, And Manner Regulations	19
C. A Least Restrictive Means Standard Would Not Enhance Core First Amendment Values And Would Impose Substantial Burdens On Governments	21
CONCLUSION	24

TABLE OF AUTHORITIES

CASES:	Page
Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986)	10
Board of Directors of Rotary Int'l v. Rotary Club, 107 S.Ct. 1940 (1987)	10
City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)	13, 19
City of Watseka v. Illinois Public Action Council, 796 F.2d 1547 (7th Cir. 1986), *aff'd mem.*, 479 U.S. 1048 (1987)	19
Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984)	*passim*
Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530 (1980)	11, 14, 19
Cox v. New Hampshire, 312 U.S. 569 (1941)	23
Frisby v. Schultz, 108 S.Ct. 2495 (1988)	14, 15, 22, 23
Grayned v. City of Rockford, 408 U.S. 104 (1972)	10, 14
Hague v. CIO, 307 U.S. 496 (1939)	22
Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981)	11, 15, 19, 22
Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979)	21
Kovacs v. Cooper, 336 U.S. 77 (1949)	10, 14
Lyng v. International Union, UAW, 108 S.Ct. 1184 (1988)	10
Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984)	11, 13, 15, 18, 23
Niemotko v. Maryland, 340 U.S. 268 (1951)	21
Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983)	11, 19
Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972)	21
Regan v. Time, Inc., 468 U.S. 641 (1984)	20, 22
Roberts v. United States Jaycees, 468 U.S. 609 (1984)	10
United States v. Albertini, 472 U.S. 675 (1985)	16, 18, 20, 23
United States v. Grace, 461 U.S. 171 (1983)	19
United States v. O'Brien, 391 U.S. 367 (1968)	*passim*
United States Postal Service v. Greenburgh Civic Ass'ns, 453 U.S. 114 (1981)	19

TABLE OF AUTHORITIES—Continued

	Page
Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976)	11-12
Wayte v. United States, 470 U.S. 598 (1985)	18
CONSTITUTIONAL PROVISION:	
U.S. Const. Amend. I	*passim*
OTHER AUTHORITIES:	
City of New York Use Guidelines for the Naumberg Bandshell in Central Park (March 21, 1986)	*passim*
Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482 (1975)	18
50 Arrested in Riot At Boston Rock Concert, N.Y. Times, Apr. 25, 1982, § 1, at p. 28, col. 6	3
P. Goldberger, *The City Observed: New York* (1979)	2
National Briefs, Associated Press, Sept. 20, 1981, AM Cycle (Los Angeles, CA)	3
Note, *Less Drastic Means and the First Amendment*, 78 Yale L.J. 464 (1969)	19-20
Radios Restricted at Sheep Meadow and 4 Beaches, N.Y. Times, July 26, 1985, at B3	2
Riot, Associated Press, Apr. 16, 1979, AM Cycle (Wichita, KS)	3

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INTEREST OF THE *AMICI CURIAE*

The interest of *amici* is set forth in the motion accompanying this brief.

STATEMENT

1. *The need to control excessive sound in Central Park.*

Central Park, an 843-acre public park located in the center of Manhattan island, was designed in the mid-1800s by Frederick Law Olmsted and Calvert Vaux as a place where persons of all backgrounds could come together in a scenic retreat to escape the tensions and con-

gestion of an increasingly industrialized city. Olmsted viewed Park visitors as gathering "with an evident glee at the prospect of coming together, all classes largely represented, with a common purpose . . . each individual adding by his mere presence to the pleasure of all others, all helping to the greater happiness of each . . . poor and rich, young and old, Jew and Gentile." P. Goldberger, *The City Observed: New York* 187 (1979).

The reasons—indeed, the necessity—for the Park, as Olmsted envisioned it, have increased over time. Studies show that the great majority of visitors still come to Central Park to relax and to escape the rigors of urban life (J.A. 40-43). Over 13 million people visit the Park each year to enjoy its fields, wooded areas, skating rinks, playgrounds, restaurants, lakes, zoo, and the Naumberg Acoustic Bandshell ("Bandshell") (J.A. 24, 40).

The Bandshell is one of the Park's most popular facilities. It is located in one of the most heavily used areas of the Park, approximately two hundred yards from residences on Fifth Avenue, roughly five hundred yards from residences along Central Park West, and less than two hundred yards from a large open field known as the Sheep Meadow, which is specifically set aside for passive recreation and relaxation such as reading and sunbathing (J.A. 214).[1] Approximately 170 sponsored events take place at the Bandshell each year between the spring and early fall (J.A. 202).

Some event sponsors have set the volume at a level far higher than that appropriate for the Bandshell's location, provoking complaints from nearby residents and Park users, including those in the Sheep Meadow area (J.A. 212-16, 397-98). In response, a program director for

[1] Mayor Edward I. Koch designated the Sheep Meadow as a "quiet zone" in July 1985 in response to a significant number of public complaints of excessive sound in the Park. As a result of that designation, the use of radios or other devices creating loud noise is not permitted. See *Radios Restricted at Sheep Meadows and 4 Beaches*, N.Y. Times, July 26, 1985, at B3.

the Bandshell was hired in January 1981 and charged with promulgating regulations to govern its use and to address the problem of excessive sound (J.A. 204-05).

2. ***The Use Guidelines.***

The first program director, petitioner Joseph Killian, conducted an extensive investigation of the problems associated with the use of the Bandshell and the possible regulatory solutions to those problems. It was clear that the prior practice of negotiating with sponsors to control the volume of sound during an event had not worked. Some sponsors, including respondent Rock Against Racism ("RAR"), had either refused to lower the volume or had lowered it only temporarily, increasing it after City representatives had left the scene (J.A. 127-31; 345-47). The only other available method to reduce the volume level had been to cut the electric power to the amplifiers (J.A. 140). Past experience, however, had shown that this approach was not feasible because audiences on occasion became so restless and unruly when concerts were abruptly ended that public safety was threatened. Indeed, during one RAR concert in Central Park, the audience became unruly in response to a Police Department request to reduce the sound volume (J.A. 346-47).[2]

Several alternatives were considered. The option of setting a maximum decibel level was rejected because

[2] The possibility of rioting by crowds at rock or similar concerts is neither illusory nor confined to New York. Rioting is especially likely to occur, and is especially violent, when a concert is stopped by police. See, *e.g.*, *50 Arrested in Riot At Boston Rock Concert*, N.Y. Times, Apr. 25, 1982, § 1, at p. 28, col. 6 (100 police officers armed with mace required to quell riot started when performance in Boston, MA, was stopped due to noise complaints); *National Briefs*, Associated Press ("A.P."), Sept. 20, 1981, AM cycle (Los Angeles, CA) (police in riot gear required to break up "melee" caused when punk rock concert was stopped due to noise complaints); *Riot*, A.P., Apr. 16, 1979, AM cycle (Wichita, KS) (500 officers with tear gas required to stop 3 hour "full-scale riot" that broke out when police shut off power at an outdoor rock concert).

differences in weather, background noise level, foliage, and audience size foreclose the choice of a single maximum decibel level that would be appropriate for all events (J.A. 220; 285-87) and because it was difficult to enforce the level set.[3] Allowing a sponsor to provide its own sound system that would be operated by a City technician was also rejected because lack of familiarity with the equipment would hinder the technician's ability to operate that system (J.A. 219-20) and because sponsors would not want others operating their equipment.[4]

After considering all the factors, Mr. Killian decided to retain a private sound company to provide and operate a complete Bandshell sound system. That approach was embodied in the Use Guidelines adopted by the City[5] in March 1986.[6] Pursuant to the Guidelines, the City con-

[3] For example, RAR members had received summonses in the past, but had failed to appear or pay the fines (J.A. 343).

[4] Allowing each sponsor to provide its own sound system posed other problems as well. The sponsor would have to transport its equipment across Park roads that are otherwise closed to vehicle traffic on weekends, thus posing a hazard to bicyclists and pedestrians (J.A. 238). In 1986, respondent used a school bus and a 40-foot flatbed trailer to transport its equipment across these roads. By contrast, the City's sound vendor uses one van (J.A. 240-41). Furthermore, the past practice of allowing sponsors to use their own equipment could, and at least once did, result in a fire hazard if groups unfamiliar with electrical wiring at the Bandshell connected their equipment to the power source improperly. In 1986, respondent itself created a fire hazard when it bypassed a fuse mechanism at the Bandshell (J.A. 242-44). NYS' familiarity with the Bandshell also allows it to set up its equipment in approximately 45 minutes to an hour (J.A. 232; 242) and greatly reduces the burden on the police and other city employees who must be on hand during Bandshell events (J.A. 126-127; 253-54; 261-63; 308-09; 345-46; 378). RAR once requested access to the Bandshell at 4 a.m. to begin setting up for a concert at noon (J.A. 241) and in fact needed more than six hours to set up (J.A. 242).

[5] We refer to all petitioners collectively as the "City."

[6] The Use Guidelines provide in relevant part:

> To provide the best sound for all events Department of Parks and Recreation has leased a sound amplification system designed for the specific demands of the Central Park Bandshell. To insure appropriate sound quality balanced with respect for nearby residential neighbors and the mayorally decreed quiet zone of Sheep Meadow, all sponsors may use only the Department of Parks and Recreation sound system. DEPARTMENT OF PARKS AND RECREATION IS TO BE THE SOLE AND ONLY PROVIDER OF SOUND AMPLIFICATION, INCLUING THOUGH NOT LIMITED TO AMPLIFIERS, SPEAKERS, MONITORS, MICROPHONES, AND PROCESSORS.
>
> Clarity of sound results from a combination of amplification equipment and a sound technician's familiarity and proficiency with that system. Department of Parks and Recreation will employ a professional sound technician [who] will be fully versed in sound bounce patterns, daily air currents, and sound skipping within the Park. The sound technician must also consider the Bandshell's proximity to Sheep Meadow, activities at Bethesda Terrace, and the New York City Department of Environmental Protection recommendations.

(J.A. 375-76). The full text of the Use Guidelines appears at J.A. 372-79.

tracted with New York Sound ("NYS") to provide all Bandshell events with a complete, top-of-the-line sound system, along with technicians to set up and operate the system (J.A. 151-56). Although only NYS technicians operate the mixing board, they are under instructions to honor all requests from the sponsor as to the mix of the sound[7] and all requests concerning the volume of sound except those that would result in excessive volume (J.A. 172-73; 176-77; 185-86; 222-23; 229-32; 297-98; Pet. App. 41-42).[8]

[7] The function of "mixing" sound consists of combining multiple signals from different sources, such as instruments or vocalists, in varying intensities that suit the tastes and intentions of the performers into one signal that is then amplified through the speakers. Mixing is performed by a sound technician at a "mixing board," which usually also contains the volume control for the music (J.A. 125-29).

[8] The record shows that this system has worked well. Sound volume has been loud enough for Bandshell audiences, but ap-

An appropriate volume of sound is determined to be that volume which can be heard sufficiently by all audience members with minimal "bleeding" of sound outside the Bandshell area into other areas of the Park, such as the Sheep Meadow, or into nearby residences (J.A. 234-36).[9] The sponsor designates a representative to sit at the mixing board during the event and to direct the NYS technician to mix the sound in the manner that the sponsor desires.[10]

3. ***Proceedings below.***

In 1985, respondent applied to the City for a permit to hold a concert at the Bandshell in May 1986. In April

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parently has not offended other Park users or nearby residents. Moreover, despite some initial misgivings, sponsors of Bandshell events, which range from opera and folk music to rock and reggae, have been pleased with the quality of equipment and service provided by NYS. At least one sponsor later retained NYS for another event outside of the Bandshell (J.A. 159-61; 184-85; 226-27; Pet. App. 41). NYS has been responsive to special needs by providing specialized equipment that a particular sponsor may require (J.A. 303-04; Pet. App. 42). Several sponsors have also found that they have saved money on sound amplification because NYS charges the City a bulk rate (J.A. 299-303).

[9] Because the maximum permissible level of sound is set at the time of the event, the NYS technician is able to choose the level appropriate in light of prevailing conditions. This practice avoids the difficulties inherent in choosing a single maximum decibel level (J.A. 223; 285-88). Decisions to lower the volume of sound are made by the City, in conjunction with the event sponsor, after the City and the sponsor together investigate the extent of sound bleeding outside the Bandshell area (J.A. 231-32; 234-36; 296-99).

[10] This practice is fundamentally the same as the method employed by respondent at its concerts. Several bands perform at those events, and respondent's practice, prior to use of the City's system, had been to have each band designate a representative to sit at the RAR mixing board and direct the RAR technicians at the board to mix the sound to suit the performers' tastes and styles (J.A. 100-03). This is a common practice (J.A. 179); and an experienced sound technician, such as those at NYS, is able to grasp the type of mix desired by performers within a few minutes (J.A. 184).

1986, respondent obtained a preliminary injunction on First Amendment and other grounds against the application to it of the Use Guidelines promulgated the previous month, and the concert took place as scheduled.

In November 1986, respondent filed an amended complaint seeking a declaratory judgment that the Use Guidelines were facially unconstitutional, as well as compensatory and punitive damages. The district court found after trial that the Use Guidelines were valid as a content-neutral regulation of the time, place, and manner (specifically the volume) of speech because they were sufficiently narrowly tailored to further the legitimate governmental interest in controlling excessive sound. Pet. App. 23-81. The court found that the NYS sound system met respondent's technical needs, that respondent retained ultimate control over the sound mix because the Guidelines permitted sponsors to choose their own mix, and that the amplification of sound was sufficient to reach throughout the audience area without bleeding into other areas of the Park or into nearby residences. Pet. App. 43, 46-49.[11] The district court also found that the RAR concerts in 1985 and 1986 had generated a number of complaints and that past efforts to reduce the sound volume at those concerts were "non-availing and confrontational." *Id.* at 47.

The Second Circuit reversed in part. Pet. App. 1-22. The court recognized that the Use Guidelines were a content-neutral regulation of the time, place, and manner of expression and that such regulations are permissible so long as they are narrowly tailored to serve a substantial governmental interest and do not unreasonably limit alternative avenues for expression. *Id.* at 11. The court stated further, however, that "the method and ex-

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[11] In a subsequent memorandum opinion and order, the district court confirmed its finding that the Use Guidelines required the NYS technician to defer to the sponsor's desires regarding the mix of sound. Pet. App. 88-89.

tent of such regulation must be reasonable, that is, it must be the least intrusive upon the freedom of expression as is reasonably necessary to achieve a legitimate purpose of the regulation." *Id.* at 12, *citing United States v. O'Brien*, 391 U.S. 367, 377 (1968).[12] The court then held that, although the City had a right to control volume, requiring the use of the sound system and technicians chosen by the City was unconstitutional because it was not the "least intrusive" means of accomplishing that purpose. Pet. App. 13-14, 19-20. The court suggested other methods of regulating the volume that it considered to be less intrusive, including ending concerts by cutting the supply of electricity to the amplifiers. *Id.* at 21 n.6.

SUMMARY OF ARGUMENT

Every First Amendment case must begin with an examination of the protected right and the extent of its alleged infringement. In this case, it is questionable whether the Use Guidelines are subject to First Amendment analysis at all because they do not adversely affect respondent's freedom of artistic expression in any significant way. If the Use Guidelines are analyzed under the standards established by this Court for time, place, and manner regulation of expressive conduct, they are plainly constitutional. They are content-neutral; they leave open ample alternative channels of communication; they serve important governmental interests; and they are narrowly tailored to serve those interests.

The Court's decisions have consistently distinguished such time, place, and manner regulations from content-based restrictions that threaten core First Amendment values. The court below erred in requiring that a narrowly tailored regulation pass muster as the "least

[12] We assume that the court was invoking a standard described by this Court as the "least restrictive means," and we use that term throughout this brief except when referring to the court of appeals' opinion.

intrusive means." The court placed mistaken reliance on *United States v. O'Brien*, 391 U.S. 367 (1968), which did not in fact inquire whether the government had chosen the least restrictive means. The court thus conferred greater First Amendment protection against a narrowly tailored regulation of the sound level of concerts in Central Park than this Court found appropriate against a complete prohibition of one form of political expression. Moreover, *O'Brien* must be read in light of later decisions of the Court that have uniformly upheld reasonable regulation of the time, place, and manner of expressive conduct without inquiring whether a less restrictive alternative could have been employed. To make such an inquiry the touchstone of the validity of content-neutral time, place, and manner regulations would prove unduly burdensome to government regulators without enhancing core First Amendment values. A reasonable legislative choice designed to balance competing concerns should not be set aside by the courts.

ARGUMENT

I. THE USE GUIDELINES ARE A VALID CONTENT-NEUTRAL REGULATION OF THE TIME, PLACE, AND MANNER OF EXPRESSION.

At issue in this case are requirements that those who desire to use the Bandshell in Central Park for concerts and other events use a sound system and sound technician chosen by the City, rather than by them, to amplify and mix the sound at their direction. These requirements are designed to limit the volume level of performances, and the district court's findings make clear that they have no adverse effect on artistic expression with respect to either sound quality or sound mix.

The nature of the Use Guidelines makes any reliance by respondent on the First Amendment tenuous at best. It is clear that the First Amendment does not encompass

a right to broadcast at whatever volume level the speaker chooses. *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972); *Kovacs v. Cooper*, 336 U.S. 77, 89 (1949). It is equally clear that a performer in a publicly owned Bandshell has no First Amendment right to use his own sound system.[13] Whatever free speech interest respondent has in the type of sound system available to it at the Bandshell, that interest certainly does not extend beyond avoiding distortion of, or other adverse effects on, respondent's artistic expression as a result of poor sound quality. The district court's findings preclude any such claim in this case.

Neither does the extremely minor restriction imposed on performers at the Bandshell by the City's selection of a sound technician intrude on any right protected by the First Amendment. The district court specifically found that the sound technician must follow the directions of the concert sponsor in all matters except excessive volume. Thus, respondent is free to give a concert in Central Park and to express exactly the message that it wants to express in the way that it wants to express it except to the extent that its expression is excessively loud. On these facts, it is difficult even to find a First Amendment right, let alone a First Amendment violation.[14]

The courts below examined the Use Guidelines as a restriction on expressive activity in a public forum, which must be justified as a content-neutral time, place, and manner regulation; and the City disputes neither that

[13] Such a right, if it existed, could not be limited to outdoor facilities or to sound systems put in place for each event, but would require the government to allow a performer to install his own sound system in an indoor concert hall as well.

[14] *See, e.g., Lyng v. International Union, UAW*, 108 S.Ct. 1184, 1189 (1988); *Board of Directors of Rotary Int'l v. Rotary Club*, 107 S.Ct. 1940, 1947 (1987); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706-07 (1986); *Roberts v. United States Jaycees*, 468 U.S. 609, 626-27 (1984).

the Bandshell is a public forum nor that the Use Guidelines affect expressive conduct. Examined as a time, place, and manner regulation, the Use Guidelines are clearly constitutional. To be valid, such a regulation must be content-neutral, leave open ample alternative channels of communication, and be narrowly tailored to serve a significant governmental interest. *See, e.g., Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). The Use Guidelines easily satisfy these criteria.

A. The Use Guidelines Are Content-Neutral.

The district court specifically found, despite respondent's "faint suggestion" to the contrary, that the Use Guidelines are content-neutral. Pet. App. 34. Respondent did not challenge this finding in the court of appeals and does not challenge it in this Court.

The Use Guidelines do, in fact, meet this Court's definitions of content-neutrality. The Use Guidelines apply to all events at the Bandshell. Their application is not "based upon either the content or subject matter of [the] speech" (*see Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 536 (1980); *accord Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981)), or any "speaker's point of view" (*see Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)). Nor is access to the Bandshell dependent in any respect on the content of the performance. Because the Bandshell is available on a first-come, first-served basis (J.A. 316), the Use Guidelines are "not open to the kind of arbitrary application that . . . has the potential for becoming a means of suppressing a particular point of view." *See Heffron*, 452 U.S. at 649. Finally, the Use Guidelines are "justified without reference to the content of the regulated speech." *See Virginia Pharmacy Board v. Virginia Citizens Con-*

sumer Council, Inc., 425 U.S. 748, 771 (1976). They are justified by the City's interests in controlling excessive noise at Bandshell events, protecting public safety, and regulating the use of City property. See Part I.C., *infra*.

B. The Use Guidelines Leave Open Ample Alternative Channels Of Communication.

The facts of this case present no real issue concerning "alternative channels of communication." An issue regarding the adequacy of alternative channels might arise, for example, if respondent had been denied use of the Bandshell or if the City had prohibited any sound amplification there. But respondent has been denied nothing except unrestricted sound amplification, with the limitations on the volume of sound enforced by requiring use of the City's chosen sound system and sound technician. The district court found that replacing the "channel" that respondent wants—the use of its own sound system and sound technician—with the "channel" available to it under the Guidelines—the sound system and sound technician designated by the City—would have no adverse effect on respondent's artistic expression or its ability to convey its message.[15] Thus, the Use Guidelines leave the expression "intact." *See Community for Creative Non-Violence*, 468 U.S. at 295.

For sponsors who insist upon using their own equipment and technicians, there are ample alternative sites for concert performances. The City itself offers three other bandshells—at Prospect Park in Brooklyn, Forest Park in Queens, and Poe Park in the Bronx—that are not subject to the Use Guidelines. There is another City-owned concert facility on Randall's Island; and probably no other city in the United States offers as wide an array

[15] Under the Use Guidelines, some speakers have found that the Bandshell has been improved as a channel for their communication because the sound quality has been enhanced and their costs have been lowered (J.A. 227-28; 299-302).

of privately owned theaters, concert halls, auditoriums, and performance centers.

Nothing in the record indicates that use of the Bandshell is a "uniquely valuable or important mode of communication." *See Vincent*, 466 U.S. at 812. Mere inconvenience or additional cost associated with a concert at another location (and there is nothing in the record to support such a claim) would not establish the constitutional insufficiency of alternative locations. In *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), for example, the Court considered an argument by owners of adult theaters that zoning restrictions left no "commercially viable" sites available within the City. *Id.* at 53. This Court responded that even though "respondents must fend for themselves in the real estate market, on on an equal footing with other prospective purchasers and lessees, [this] does not give rise to a First Amendment violation" because "we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices." *Id.* at 54.

The First Amendment does not confer a right of expression in exactly the manner of the speaker's choosing; it requires only that ample alternative channels exist if one means of expression is restricted. Even if the Use Guidelines are viewed as restricting one channel of communication, they themselves provide another. Alternatively, respondent may use any of innumerable unregulated public and private locations.

C. The Use Guidelines Are Narrowly Tailored To Serve Significant Governmental Interests.

The heart of this case is whether the Use Guidelines are narrowly tailored to serve significant governmental interests. The district court found that the Use Guidelines are intended to regulate the volume of sound at the Bandshell. Pet. App. 40. This Court has recognized

the significance of the governmental interest in regulating excessive sound volume (*see Grayned*, 408 U.S. at 116; *Kovacs*, 336 U.S. at 89), which respondent does not dispute.

The court of appeals, although paying lip service to this interest (Pet. App. 13-14) and to "a city's interest in attempting to preserve the quality of urban life" (*id.* at 10-11), failed to appreciate the problems that the City had experienced in past efforts to control volume at Bandshell events. The court of appeals gave virtually no weight to the rights of other Park users and nearby residents, a "'captive' audience" whose tranquility and relaxation the City may legitimately protect. *See Frisby v. Schultz*, 108 S.Ct. 2495, 2503 (1988), *citing Consolidated Edison*, 447 U.S. at 542. Park users should not have to avoid, and nearby residents cannot avoid, excessive sound volume. Providing them protection through the Use Guidelines furthers a significant governmental interest.

The court of appeals also failed to heed the City's significant interests in public safety and the preservation of public property. By placing control of the volume in the hands of the City, the Use Guidelines reduce the possibility that a Bandshell event will have to be terminated abruptly to control excessive sound levels, a practice that can lead to riots (see page 3 and note 2, *supra*).[16] In addition, the record shows that technicians unfamiliar with the stage can create serious fire hazards (see note 4, *supra*). The Use Guidelines also serve to minimize vehicular traffic through the Park, or at least to

[16] The court of appeals' limited appreciation of the interests at stake here is captured by its suggestion that, if a sponsor's sound technician proved uncooperative, the City could just "pull the plug." Pet. App. 21 n.6. Such an approach does not even serve the City's interest in preventing excessive noise; it surely does not serve the City's interests in public safety and protection of public property.

reduce traffic by those unfamiliar with Park roads and with the City's practice of closing those roads on the weekend (see *ibid.*). Finally, NYS' familiarity with the Bandshell expedites the process of setting up for concerts and thus reduces the administrative burdens on the City's police and other personnel. (See *ibid.*). These important safety and administrative concerns cannot be overlooked in evaluating the Use Guidelines. *See Community for Creative Non-Violence*, 468 U.S. at 299 ("there is a substantial Government interest in conserving park property"); *Heffron*, 452 U.S. at 650 ("protecting the 'safety and convenience' of persons using a public forum is a valid governmental objective").

The Use Guidelines are narrowly tailored to serve these significant interests. They have no adverse effect on freedom of expression because each sponsor determines its own sound mix using the high quality equipment and experienced technicians supplied by NYS. Only excessive volume is affected. The Use Guidelines target and eliminate no more than the exact source of the "evil" they seek to remedy. *See Frisby*, 108 S.Ct. at 2502. Thus, they "respon[d] precisely to the substantive problem which legitimately concerns the City. The [Use Guidelines] curtai[l] no more speech than is necessary to accomplish [their] purposes." *See Vincent*, 466 U.S. at 810.

Any argument that the City could accomplish its objective by less restrictive means ignores the facts concerning past attempts to control sound volume at the Bandshell.[17] The district court specifically found that the City's prior efforts had been "non-availing and confrontational." Pet. App. 47. The court of appeals' sug-

[17] As we discuss in Part II, *infra*, we do not believe that the least restrictive means test is properly applied to content-neutral time, place, and manner regulations. Our point here is simply that the Use Guidelines are in fact the least restrictive means of serving all of the City's interests.

gestion that the City control the sound volume by pulling the plug would, of course, result in a much more serious intrusion on the performance.

In any event, the alternatives suggested by respondent and the court of appeals would not address the additional significant governmental interests at stake. The Use Guidelines are narrowly tailored to prevent crowd disturbances at Bandshell events by eliminating the possibility that the City would have to "pull the plug" to control volume. They also serve to protect the public from fire hazards by allowing only technicians who are familiar with the Bandshell to connect to the power source. Finally, the Use Guidelines minimize unnecessary traffic and administrative burdens by providing a complete sound system to all sponsors. Like the control of sound volume, these interests are served with, at most, a negligible impact on expression.

Respondent's focus on its own dissatisfaction with the Guidelines is misplaced. The determination whether a regulation is narrowly tailored is to be made in light of its overall purpose, not by reference to the facts of a particular case. *See United States v. Albertini*, 472 U.S. 675, 688-89 (1985); *Community for Creative Non-Violence*, 468 U.S. at 296-97. Given the number of governmental interests that the Use Guidelines are designed to serve, they are narrowly tailored.

II. THE LEAST RESTRICTIVE MEANS STANDARD IS NOT THE PROPER MEASURE OF THE VALIDITY OF TIME, PLACE, AND MANNER REGULATIONS.

The court below announced that it was analyzing the City's Use Guidelines in light of the time, place, and manner test applied by this Court in *Community for Creative Non-Violence*, 468 U.S. at 295: "Content neutral time, place, and manner regulations are permissible so long as they are narrowly tailored to serve a substantial government interest and do not unreasonably

limit alternative avenues of expression." Pet. App. 11. The court properly explained that to satisfy this test the regulations must be "reasonable" (*id.* at 12), although, as we argue in Part I, *supra*, the court erred in applying the test to the Use Guidelines. The court continued, however, by defining "reasonable" as "the least intrusive upon the freedom of expression as is reasonably necessary to achieve a legitimate purpose of the regulation." *Id.* at 12; see also *id.* at 16, 20, 21. The court's casual incorporation of a least restrictive means requirement imposes on time, place, and manner regulations a heightened degree of scrutiny that is inconsistent with the prevailing weight and logic of this Court's recent decisions, unduly burdensome on government regulators, and not necessary to protect First Amendment freedoms.

A. *O'Brien* Does Not Require Application Of A Least Restrictive Means Standard To Time, Place, And Manner Regulations.

Among this Court's First Amendment cases, the court of appeals grounded its decision on language used in *United States v. O'Brien*, 391 U.S. at 377. *O'Brien* involved a federal criminal prosecution for the violation of a statute that prohibited the intentional destruction of a draft card. O'Brien argued that the statute could not constitutionally be applied to him because burning his draft card was "symbolic speech" meant to protest the Vietnam war and the draft. 391 U.S. at 376. The Court rejected his contention, applying a four-part test for determining when a governmental interest sufficiently justifies the regulation of excessive conduct. The fourth element, which the court of appeals cited, is whether "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that [governmental] interest." 391 U.S. at 377.[18]

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[18] The other elements of the *O'Brien* test are whether the regulation "is within the constitutional power of the Government";

This reliance on *O'Brien* is misplaced. As the Court later noted, the phrase "no greater than is essential" appears to require no more than "narrow tailoring." *See Community for Creative Non-Violence*, 468 U.S. at 298 (the four-factor *O'Brien* test is "little, if any, different from the standard applied to time, place, or manner restrictions"); *id.* at 298 n. 8 ("if the time, place, or manner restriction on expressive sleeping . . . sufficiently and narrowly serves a substantial enough governmental interest to escape First Amendment condemnation, it is untenable to invalidate it under *O'Brien*").

Moreover, the court below failed to appreciate that the Court in *O'Brien* did not in fact inquire whether means less restrictive than a complete prohibition would have served the government's interest. See Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1487 (1975). The court of appeals also appeared to forget not only that *O'Brien* had upheld the restriction challenged in that case,[19] but what the restriction was. *O'Brien* involved a complete prohibition of expressive activity that was at the core of the First Amendment because of its unquestionable political content. In marked contrast, the Use Guidelines are a narrow time, place, and manner regulation that affects at most marginal rights of expression. It is inconceivable that the First Amendment would impose a higher level of scrutiny on a City's attempt to regulate excessive

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whether "it furthers an important or substantial governmental interest"; and whether "the governmental interest is unrelated to the suppression of free expression." *O'Brien*, 391 U.S. at 377.

[19] In fact, in four subsequent cases in which the Court applied the *O'Brien* test, it upheld the challenged regulations. *See United States v. Albertini*, 472 U.S. 675, 687-88 (1985); *Wayte v. United States*, 470 U.S. 598, 611 (1985); *Community for Creative Non-Violence*, 468 U.S. at 298; and *Vincent*, 466 U.S. at 805.

sound levels, without disturbing artistic expression, than on a complete prohibition of one form of political expression.

Finally, *O'Brien* does not stand alone among the Court's First Amendment cases. In the twenty years since *O'Brien* was decided, this Court has developed a sizeable jurisprudence regarding content-neutral time, place, and manner regulations. These cases apply the test set out in Part I of this brief that asks whether the regulation leaves open ample alternative channels of communication and is narrowly tailored to serve a significant governmental interest. *See, e.g., City of Renton*, 475 U.S. at 47; *Community for Creative Non-Violence*, 468 U.S. at 293; *United States v. Grace*, 461 U.S. 171, 177 (1983); *Perry*, 460 U.S. at 45; *United States Postal Service v. Greenburgh Civic Ass'ns*, 453 U.S. 114, 132 (1981); *Heffron*, 452 U.S. at 647-48; *Consolidated Edison*, 447 U.S. at 535. To the extent that these cases represent a different doctrinal line from *O'Brien*, we submit that they formulate the prevailing standard for judging all time, place, and manner regulations.

B. This Court Has Specifically Rejected A Least Restrictive Means Standard For Review Of Time, Place, and Manner Regulations.

On at least three occasions, this Court has rejected attempts to graft a least restrictive means standard onto the time, place, and manner test.[20] In *Community for*

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[20] Although the Court has described this standard as both "less restrictive" and "least restrictive," there would not appear to be any difference in the degree of scrutiny. So long as a court can identify a "less restrictive" alternative, it can strike down a regulation on that basis until no "less restrictive" alternative exists, that is, until the regulation is the "least restrictive" possible. *See City of Watseka v. Illinois Pub. Action Council*, 796 F.2d 1547, 1557 (7th Cir. 1986), *aff'd mem.*, 479 U.S. 1048 (1987); see also Note, *Less Drastic Means and the First Amendment*, 78 Yale L. J. 464,

Creative Non-Violence, the Court applied both the prevailing time, place, and manner test and the *O'Brien* formulation to a claimed First Amendment right to engage in expressive sleeping in the public parks of Washington, D.C. The Court sustained a prohibition of sleeping in the park as a reasonable time, place, and manner regulation and suggested that *O'Brien* required no greater scrutiny. 468 U.S. at 293. The Court further concluded that the regulation was valid even if less restrictive alternatives were available: "We are unmoved by the Court of Appeals' view that the challenged regulation is unnecessary, and hence invalid, because there are less speech-restrictive alternatives that could have satisfied the Government interest in preserving park lands." *Id.* at 299.

Similarly, in *Regan v. Time, Inc.*, 468 U.S. 641 (1984) (plurality opinion), four Justices agreed that a "less restrictive alternative" analysis "places . . . too heavy a burden on those enacting time, place, and manner regulations" and that such analysis "has never been a part of the inquiry into the validity of a time, place, and manner regulation." *Id.* at 656, 657. "It is enough," the plurality concluded, that the regulation "substantially serves the Government's legitimate ends." *Id.* at 657.

Most recently, in *Albertini*, the Court sustained government regulations that barred from a military base persons who had been ordered not to reenter even though the ban was "not 'essential' in any absolute sense to security at the military base." 472 U.S. at 688. In the Court's view, the existence of less restrictive alternatives provided "an answer to the wrong question . . . . [R]egulations [are not] invalid simply because there is some imaginable alternative that might be less burdensome on speech." *Id.* at 688-89.

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464 (1969) (identifying various expressions used by the Court to mean less restrictive).

C. A Least Restrictive Means Standard Would Not Enhance Core First Amendment Values And Would Impose Substantial Burdens On Governments.

The Court has properly refused to subject time, place, and manner regulations to a least restrictive means test. Such heightened scrutiny would provide little, if any, additional protection of core First Amendment values, yet would impose unwarranted and substantial burdens on governments. This Court has recognized that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). For this reason, content-based restrictions are scrutinized with great care to ensure that communication has not been prohibited "merely because public officials disapprove the speaker's views." *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring). But the danger of the suppression of ideas does not exist in equal measure where the regulation is content-neutral. Thus, a heightened scrutiny does little or nothing to enhance core First Amendment values.

If content-neutral time, place, and manner regulations were to be subjected to a least restrictive means standard, governmental agencies would incur enormous increased costs—for empirical studies, detailed reports, and protracted meetings—in an attempt to anticipate what a court would subsequently determine to be the least restrictive means of achieving their aims. Even then, "[a] judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation." *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 188-89 (1979) (Blackmun, J., concuring).

The difficulties that governments would face are illustrated by a number of recent cases in which the Court sustained a content-neutral time, place, and manner regu-

lation on the ground that it was narrowly tailored to serve significant governmental interests, but in which the regulation was plainly not the least restrictive. In *Frisby*, a limitation on the size or number of demonstrations would have been less restrictive than the ban on residential picketing (see 108 S.Ct. at 2503-04). In *Regan v. Time*, prohibiting only those illustrations of currency that genuinely had the capacity to deceive would have been less restrictive than prohibiting all color illustrations and all those of a certain size (see 468 U.S. at 656-57). In *Community for Creative Non-Violence*, a limitation on "the size, duration, or frequency of demonstrations" (468 U.S. at 299) would have been less restrictive than the total prohibition of sleeping in the park. And in *Heffron*, "penalizing disorder or disruption, limiting the number of solicitors, or putting more narrowly drawn restrictions on the location and movement of [solicitors]" (452 U.S. at 654) would have been less restrictive than relegating them to a booth. Application of a least restrictive means standard in these and other cases might well have changed the result and thus prevented the government from protecting its concededly significant interests.

Content-neutral regulations of expressive conduct reflect legislative attempts to balance conflicting interests. The privilege of using even the parks, which have "immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions," "is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order." *Hague v. CIO*, 307 U.S. 496, 515-16 (1939) (Roberts, J., concurring). All that is required of the government is that it strike a balance that reasonably accommodates the competing concerns. Here, allowing respondent to assault other park users

and nearby residents with excessive noise, even for short intervals, would not balance their interests, but would sacrifice them. Where, as in this case, regulation with at most a negligible impact on First Amendment rights protects important competing rights that would otherwise be destroyed, the legislative choice of means must be upheld. *See Frisby*, 108 S.Ct. at 2502-04; *Vincent*, 466 U.S. at 810. The Use Guidelines do no more than "maintai[n] [the] public order without which liberty itself would be lost in the excesses of unrestrained abuses." *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941).

The Court has noted time and again that courts should not engage in speculative, *post hoc* calculations of the degree of precision achieved by the government's attempt to tailor a regulation narrowly. "The validity of such regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests." *Albertini*, 472 U.S. at 689. Such judicial ruminations would effectively usurp the legislative function and needlessly involve the judiciary in areas beyond its particular competence.

The Court could have been describing the present case when it wrote:

> There is no gainsaying that [the regulation] will avoid a measure of actual or threatened damage to [the Park]. The Court of Appeals' suggestions that the Park Service minimize the possible injury by reducing the size, duration, or frequency of demonstrations would still curtail the total allowable expression in which demonstrators could engage . . . and these suggestions represent no more than a disagreement with the Park Service over how much protection the core parks require or how an acceptable level of preservation is to be attained. We do not believe, however, that . . . the time, place, or manner decisions assign to the judiciary the author-

> ity to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained.

Community for Creative Non-Violence, 468 U.S. at 299. These words demonstrate the clear error of the court of appeals' assumption that it was better able than the City to determine how best to regulate the noise level of concerts at the Bandshell. *Amici* strongly urge the Court, in reversing, to reaffirm unmistakably that the least restrictive means standard has no place in the First Amendment review of time, place, and manner regulations.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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